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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

TEOFIL BRANK,

Defendant.

No. CR 15-0131(A)-JFW

TRIAL MEMORANDUM

Trial Date: May 12, 2015
Time: 8:30 a.m.
Location: Courtroom of the
Hon. John F. Walter

Plaintiff United States of America, by and through its counsel
of record, the United States Attorney for the Central District of
California and Assistant United States Attorneys Vanessa Baehr-Jones

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1 and Kimberly D. Jaimez, hereby submits its trial memorandum.

2 Dated: May 7, 2015

Respectfully submitted,

3 STEPHANIE YONEKURA
4 Acting United States Attorney

5 ROBERT E. DUGDALE
6 Assistant United States Attorney
7 Chief, Criminal Division

8 /s/
9 VANESSA BAEHR-JONES
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13 UNITED STATES OF AMERICA
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1 **I. STATUS OF THE CASE**

2 **A. Procedural Background**

3 Defendant Teofil Brank ("defendant") is charged in the First
4 Superseding Indictment ("FSI") with transmitting threatening
5 communications with the intent to extort, in violation of 18 U.S.C.
6 § 875(d), extortion and attempted extortion affecting interstate
7 commerce by nonviolent threat, in violation of 18 U.S.C. § 1951(a),
8 receiving proceeds of extortion, in violation of 18 U.S.C. § 880, use
9 of an interstate facility to facilitate an unlawful activity, in
10 violation of 18 U.S.C. § 1952(a)(3), and possession of a firearm in
11 furtherance of a crime of violence, in violation of 18 U.S.C. §
12 924(c)(1)(A)(i).

13 **B. Government's Case-in-Chief**

14 The government estimates that it will call seven to eight
15 witnesses in its case-in-chief, unless the parties reach agreement on
16 stipulations that would eliminate the need for the government to call
17 one of those witnesses. The government estimates that it will take
18 no more than two days to present its case-in-chief (not including the
19 time for jury selection). Should defendant offer witnesses in his
20 defense, the government also may choose to call rebuttal witnesses.

21 **C. Stipulations**

22 The government has proposed stipulating to the following facts
23 to streamline the proof offered at trial:

24 (1) A stipulation that the \$500,000 wire transfer between Victim
25 D.B.'s Goldman Sachs account and defendant's Wells Fargo account went
26 between accounts located in different states.
27
28

1 **II. ELEMENTS OF THE CHARGED OFFENSES**

2 1. 18 U.S.C. § 875(d) (Count One)

3 The elements of § 875(d) are: (1) defendant knowingly sent a
4 communication in interstate commerce containing a true threat to
5 damage the reputation of D.B.; and (2) defendant did so with the
6 intent to extort money or something else of value. Eleventh Circuit
7 Pattern Criminal Jury Instructions, C.18.30.4 (2010) (modified to
8 reflect charge in this case); United States v. Coss, 677 F.3d 278
9 (6th Cir. 2012). There is no requirement that the sender and
10 recipient were located in separate states at the time the message was
11 sent and received for the communication to be sent in interstate
12 commerce. In United States v. Sutcliffe, 505 F.3d 944 (9th Cir.
13 2007), the defendant posted threats on a website. The Ninth Circuit
14 held that evidence that, during the relevant time period, the website
15 was uploaded to various servers located in Louisiana, North Carolina,
16 and Virginia satisfied the jurisdictional element of 18 U.S.C.
17 § 875(c).

18 Moreover, here, many of the threats occurred over text message.
19 This form of communication is sufficient to satisfy the
20 jurisdictional requirement. See United States v. Kammersell, 196
21 F.3d 1137, 1138-39 (10th Cir. 1999) (holding that threat sent by
22 instant message over interstate telephone lines "falls within the
23 literal scope of [§ 875(c)] and gives rise to federal jurisdiction").

24 2. 18 U.S.C. § 1951(a) (Counts Two and Five)

25 The elements of § 1951(a), Hobbs Act – Extortion or Attempted
26 Extortion by Nonviolent Threat, are: (1) the defendant induced D.B.
27 to part with property by wrongful threat of reputational harm;
28 (2) the defendant acted with the intent to obtain property; and

1 (3) commerce from one state to another was affected in some way.
2 Ninth Circuit Model Criminal Jury Instructions, No. 8.142A (modified
3 to reflect charge in this case). In Count Five, the government has
4 alleged attempted extortion, which has the following additional
5 element: the defendant did something that was a substantial step
6 toward committing the crime. For purposes of showing the effect on
7 interstate commerce, interstate commerce includes the movement of
8 goods, services, money and individuals between states. These goods
9 can be legal or illegal. Only a minimal effect on commerce is
10 required and the effect need only be probable or potential, not
11 actual. See Ninth Circuit Model Criminal Jury Instructions, No.
12 8.152 (relevant portion only); 18 U.S.C. § 1951(b)(3).

13 Defendant is not entitled to a "claim of right defense." An
14 instruction on this defense is only applicable if the threat is not
15 inherently wrongful. See United States v. Villalobos, 748 F.3d 953
16 (9th Cir. 2014). If a nonviolent threat is to be carried out by
17 unlawful means, then the Hobbs Act's "wrongful" requirement is
18 satisfied, regardless of whether the defendant had a lawful claim of
19 right to the property demanded. Id. at 957-58.

20 Here, defendant threatened to disclose embarrassing, sensitive
21 information of a sexual nature about the Victim D.B. on defendant's
22 Twitter account (which has several thousand followers) if D.B.
23 refused to comply with defendant's demands. Such a threat is always
24 wrongful, regardless of whether defendant actually or reasonably
25 believed that he was entitled to the money. In the context of a
26 reputational threat, if there is no nexus between the reported injury
27 (i.e. the broadcasted, harmful information about the victim), and the
28 act the defendant was allegedly seeking compensation for, then the

1 use of the threat to attempt to regain the property or proceeds is
2 inherently wrongful, and no claim of right defense applies.

3 3. 18 U.S.C. § 880 (Counts Three and Four)

4 Receiving proceed/property of extortion in violation of § 880
5 has the following elements: (1) defendant received, possessed,
6 concealed, or disposed of money or other property; (2) the property
7 was obtained from the commission of the offense charged in count one,
8 namely, transmitting threatening communications with intent to
9 extort; (3) the offense is punishable by imprisonment for more than
10 one year; and (4) defendant knew the money or other property had been
11 unlawfully obtained. See 18 U.S.C. § 880.

12 4. 18 U.S.C. § 1952(a)(3) (Count Six)

13 The elements of § 1952(a)(3) are: (1) the defendant used a
14 facility of interstate or foreign commerce, namely a cellular
15 telephone, with the intent to promote, manage, establish, or carry
16 on, or facilitate the promotion, management, establishment, or
17 carrying on of an unlawful activity, namely, extortion offenses in
18 violation of the laws of the State of California and of the United
19 States; (2) after doing so the defendant attempted to perform acts to
20 promote, manage, establish, carry on, or facilitate the promotion,
21 management, establishment, and carrying on of, the extortion; and
22 (3) the defendant did something that was a substantial step toward
23 committing the crime. Ninth Circuit Model Criminal Jury
24 Instructions, No. 8.144 (modified to reflect charge in this case).

25 5. 18 U.S.C. § 924(c) (Count Seven)

26 The elements of § 924(c) are: (1) the defendant committed the
27 crime of attempted extortion as charged in Count Five of the
28 indictment, which is a crime of violence; and (2) the defendant

1 knowingly carried the Colt revolver during and in relation to that
2 crime. Ninth Circuit Model Criminal Jury Instructions, No. 8.71
3 (modified to reflect the charge in this case).

4 6. Forfeiture Allegations

5 At the end of the FSI, the government also notified defendant
6 pursuant to Rule 32.2(c) of the Federal Rules of Criminal Procedure
7 that it seeks forfeiture of property in the event he is convicted of
8 violating 18 U.S.C. § 875(d) or 18 U.S.C. § 1951(a) as charged in
9 Counts One and Two of the FSI ("the forfeiture allegation"). The
10 forfeiture allegation seeks forfeiture of any property which
11 constitutes or is derived from proceeds traceable to the offenses
12 charged in Counts One and Two.

13 **III. STATEMENT OF FACTS**

14 At trial, the United States intends to prove the following
15 facts, among others:

16 On February 16, 2015, defendant threatened to disclose
17 embarrassing, sensitive information of a sexual nature about the
18 Victim on defendant's Twitter account (which has several thousand
19 followers) if the Victim refused to comply with defendant's demands.
20 Initially, defendant demanded, over text messages, cash payments and
21 defendant's Audi R8, valued at \$180,000. In an attempt to appease
22 defendant and protect his reputation, the Victim ultimately wired
23 defendant \$500,000 and turned over to defendant his car. Still
24 unsatisfied, defendant made additional demands, including additional
25 cash payments and title to the Audi. As the extortion escalated, on
26 March 3, 2015, the Victim contacted the Federal Bureau of
27 Investigation ("FBI") and requested their assistance.

1 On March 4, 2015, defendant instructed the Victim in a text
2 message to meet at the Grove shopping mall to turn over an additional
3 \$1,000,000 in cash and the title for the Audi. At the direction of
4 the FBI, the Victim requested a different meeting location, a
5 Starbucks in El Segundo, and told defendant that his "trusted
6 friend," who was actually an FBI agent acting undercover, would make
7 the delivery on his behalf.

8 In preparation for the meeting, defendant and Etienne Yim
9 ("Yim") obtained a gun from Benjamin Williams ("Williams"),
10 specifically a .357 caliber, Colt Python revolver. According to
11 Williams, Yim and a friend, whom Williams did not know, but whom he
12 described in a manner that matches the physical description of
13 defendant, arrived at his house in San Diego at approximately 2:00
14 p.m. on March 4, 2015. Yim, who had previously borrowed Williams'
15 gun and ammunition to go to a firing range, asked Williams to lend
16 him the weapon.

17 After leaving William's residence on March 4, 2015, defendant
18 and Yim travelled back to Los Angeles. During the trip, defendant
19 called the Victim and threatened him, saying that if anything went
20 wrong, defendant had backup. Specifically, he told the victim in a
21 recorded call, "Look, I'm not coming alone too, I'm, if I'm coming I
22 have others that are known that if anything happens, if anything
23 happens, they have all that I need . . . for anything else"
24 Just as defendant had threatened in the call, Yim drove defendant to
25 the meet location and waited outside the Starbucks – with the gun
26 stashed in defendant's backpack – while defendant went in to retrieve
27 the proceeds of the extortion.
28

1 The government will prove these facts through the following
2 evidence: (1) text messages found on the cellular telephones of
3 Victim and defendant, as well as testimony from a law enforcement
4 agent about the extraction of evidence from defendant's phone;
5 (2) testimony of the Victim; (3) testimony from the undercover FBI
6 agent who participated in the March 4, 2015, meet; (4) video
7 recording of the March 4, 2015, attempted extortion; (5) audio
8 recordings of the call between defendant and the Victim on March 4,
9 2015; (6) testimony from Yim and Williams about how defendant
10 obtained the firearm; (7) testimony from the FBI agent who found the
11 Audi r8; (8) certified public records showing the make, model, serial
12 number, and registration information for the firearm; (9) business
13 records showing the \$500,000 wire transfer between the Victim's
14 account and the defendant's account; (10) defendant's emailed apology
15 to the Victim; and (11) photographs of relevant locations and items
16 of evidence. The government reserves the right to present more or
17 different evidence depending on the circumstances of trial.

18 **IV. EVIDENTIARY AND LEGAL ISSUES**

19 **A. Defendant's Unfounded, Self-Serving Allegations**

20 Defendant has made several allegations about Victim, namely,
21 that the Victim raped him and has solicited sex with minors. To
22 date, the government has found no evidence supporting either of these
23 allegations, and has moved to exclude defendant's rape allegation.

24 While a defendant has a constitutional right to confront
25 witnesses against him, see Davis v. Alaska, 415 U.S. 308, 315 (1974),
26 the Court has the authority to limit the scope of cross-examination,
27 see Fed. R. Evid. 611 ("The court should exercise reasonable control
28 over the mode and order of examining witnesses and presenting

1 evidence so as to: (1) make those procedures effective for
2 determining the truth; (2) avoid wasting time; and (3) protect
3 witnesses from harassment or undue embarrassment."). Where evidence
4 fails to touch on a witness's ability to be truthful, to recall
5 events, or to show a bias, the Court should exclude it. United
6 States v. Mohamed, 410 F. Supp. 2d 913, 916-17 (S.D. Cal. 2005). If
7 the evidence is relevant to show lack of truthfulness or bias, the
8 Court should still exclude it if its "probative value is
9 substantially outweighed by the danger of unfair prejudice, confusion
10 of the issues, or misleading the jury, or by considerations of undue
11 delay, waste of time, or needless presentation of cumulative
12 evidence." Id. (citing Fed. R. Evid. 403).

13 Here, not only has the government found no evidence supporting
14 defendant's allegations, but the allegations themselves have nothing
15 to do with the Victim's ability to be truthful, his ability to
16 perceive or recall events, or any bias he might have. Such
17 allegations also bear no relevance to the events at issue here,
18 namely, whether defendant extorted and attempted extort the Victim.
19 As such, the Court should exclude all of it as both irrelevant and
20 unfairly prejudicial.

21 Where a line of questioning is not probative of a witness's
22 credibility and would harass the witness, the court must exclude it
23 to protect the witness from harassment or undue embarrassment.
24 United States v. Belloc, 917 F.2d 1307, 1309 (9th Cir. 1990)
25 (excluding cross-examination of cooperating witness about allegedly
26 beating his son and wanting to have his son born in Mexico so the
27 witness could purchase property and grow marijuana there). Here,
28 asking the Victim about defendant's unfounded allegations is wholly

1 irrelevant and, as in Belloc, should be excluded to prevent
2 harassment of the victim.

3 Moreover, the facts here can be analogized to those in cases
4 where Federal Rule of Evidence 412 protects a victim from "evidence
5 offered to prove the victim engaged in other sexual behavior,
6 or . . . to prove a victim's sexual predisposition." Fed. R. Evid.
7 412(a). Rule 412 limits cross-examination of a victim in a case
8 alleging sexual misconduct and was intended "to safeguard the alleged
9 victim against the invasion of privacy, potential embarrassment and
10 sexual stereotyping that is associated with public disclosure of
11 intimate sexual details and the infusion of sexual innuendo into the
12 fact-finding process. By affording victims protection in most
13 instances, the rule also encourages victims of sexual misconduct to
14 institute and to participate in legal proceedings against alleged
15 offenders." Fed. R. Evid. 412, Advisory Committee Notes (1994). The
16 same rationale applies to victims of extortion: a victim should not
17 be subject to allegations thrown out in the public forum of trial
18 simply because he has come forward to report threats of reputational
19 harm. To allow for such self-serving, unfounded allegations to be
20 admitted without limit during cross-examination would accomplish the
21 very harm 18 U.S.C. § 1951(a) was meant to protect against and would
22 discourage victims from reporting.

23 **B. Recorded Conversations**

24 At trial, the government expects to introduce one audio
25 recording between the Victim and defendant, along with a transcript
26 of the recording, and one video recording of the undercover meet with
27 defendant, along with the transcript. Each recording and transcript
28 has been produced to the defense and has been placed onto compact

1 discs, which the government will offer as exhibits at trial. The
2 conversations captured by the recordings occurred entirely in
3 English.¹ Per the Court's trial order, the government has produced
4 final transcripts for the recordings to defense counsel. Transcript
5 books will be prepared for the Court and jury.

6 All duly admitted recorded conversations must be played in open
7 court.² The foundation that must be laid for the introduction into
8 evidence of recorded conversations is a matter largely within the
9 discretion of the trial court. There is no rigid set of foundational
10 requirements. Rather, the Ninth Circuit has held that recordings are
11 sufficiently authenticated under Federal Rule of Evidence 901(a) if
12 sufficient proof has been introduced "so that a reasonable juror
13 could find in favor of authenticity or identification," which can be
14 done by "proving a connection between the evidence and the party
15 against whom the evidence is admitted" and can be done by both direct
16 and circumstantial evidence. United States v. Matta-Ballesteros, 71
17 F.3d 754, 768 (9th Cir. 1995), modified by 98 F.3d 1100 (9th Cir.
18 1996).

19 Witnesses may testify competently as to the identification of a
20 voice on a recording. A witness's opinion testimony in this regard
21 may be based upon his having heard the voice on another occasion

22
23 ¹ For recorded conversations in the English language, the
24 recording itself is the evidence, and a transcript of the recording
25 may be provided as an aid in following the conversation. United
States v. Chen, 754 F.2d 817, 824 (9th Cir. 1985); United States v.
Phillips, 577 F.2d 495, 501-02 (9th Cir. 1978).

26 ² Allowing jurors to take into the jury deliberation room
27 recorded conversations that were not played in open court is
28 structural error requiring automatic reversal if a defendant objects
to allowing the jurors to have the un-played recordings in the jury
room. United States v. Noushfar, 78 F.3d 1442, 1444-45 (9th Cir.
1996).

1 under circumstances connecting it with the alleged speaker. Fed. R.
2 Evid. 901(b)(5); United States v. Torres, 908 F.2d 1417, 1425 (9th
3 Cir. 1990) ("Testimony of voice recognition constitutes sufficient
4 authentication."). In this case, the government expects that the
5 Victim will authenticate the recorded call between himself and
6 defendant because he was part of the call, and recognizes the voices
7 on the call. The video recording will be authenticated by the
8 undercover agent.

9 **C. Expert and Related Evidence**

10 The government has provided notice to defendant, pursuant to
11 Federal Rule of Criminal Procedure 16(a)(1)(G), that it intends to
12 call as a witness Scott Saul, a Computer Forensic Examiner with the
13 FBI. Mr. Saul is the computer forensic examiner who processed the
14 seized digital device in this investigation. He is expected to
15 testify about the contents of the digital device generally and his
16 method of examining the phone. Mr. Saul will testify about the
17 extraction process he employed. He will also generally discuss write
18 blocking, retrieving deleted messages, wiping a device, and hash
19 values, and will explain the significance of these to this case. He
20 will also testify that the exhibits retrieved from the phone, which
21 were provided to you in discovery and will be further specified to
22 you before trial, were obtained from the smartphone. He will discuss
23 various terms relating to smartphone forensics, including digital
24 files, file path location, dates of creation, modification, and
25 access, backup techniques, and the process of searching digital
26 devices and extracting files.

1 The government does not believe that the above testimony
2 constitutes expert testimony, but has nevertheless provided notice to
3 defendant.

4 1. Opinion Testimony of Government Agent

5 An experienced government agent may provide opinion testimony
6 even if that opinion is based in part on information from other
7 agents familiar with the issue. United States v. Andersson, 813 F.2d
8 1450, 1458 (9th Cir. 1987); United States v. Golden, 532 F.2d 1244,
9 1248 (9th Cir. 1976). An experienced government agent may testify as
10 to his opinions and impressions of what he observed. As the court in
11 United States v. Skeet, 665 F.2d 983, 985 (9th Cir. 1982), stated:

12 Opinions of non-experts may be admitted where the facts
13 could not otherwise be adequately presented or described to
14 the jury in such a way as to enable the jury to form an
15 opinion or reach an intelligent conclusion. If it is
16 impossible or difficult to reproduce the data observed by
17 the witnesses, or the facts are difficult of explanation,
or complex, or are of a combination of circumstances and
appearances which cannot be adequately described and
presented with the force and clearness as they appeared to
the witness, the witness may state his impressions and
opinions based upon what he observed.

18 Ultimately, opinion testimony by non-experts is "a means of conveying
19 to the jury what the witness has seen or heard." Id.

20 Courts have admitted opinion testimony by law enforcement agents
21 on a number of issues, such as (1) the modus operandi of drug
22 traffickers, United States v. Espinosa, 827 F.2d 604, 612 (9th Cir.
23 1987) (holding that district court properly admitted law enforcement
24 officer's expert testimony expert on the modus operandi of narcotics
25 traffickers, including use of "stash pads" for drugs); (2) the use of
26 guns by drug traffickers, United States v. Perez, 116 F.3d 840, 848
27 (9th Cir. 1997); and (3) a defendant's apparent attempt to avoid
28 surveillance, Andersson, 813 F.2d at 1458. An experienced narcotics

1 agent's opinion testimony may be based in part on information from
2 other agents familiar with the issue. United States v. Beltran-Rios,
3 878 F.2d 1208, 1213 n.3 (9th Cir. 1989).

4 Further, under Ninth Circuit law, opinion testimony by law
5 enforcement officers is not necessarily expert testimony within the
6 meaning of Rule 16(a)(1)(G). In United States v. VonWillie, 59 F.3d
7 922 (9th Cir. 1995), for instance, the Ninth Circuit held that the
8 district court properly admitted testimony by a law enforcement agent
9 that drug traffickers commonly used weapons "to protect their drugs
10 and to intimidate buyers" as lay testimony. Id. at 929.

11 **D. Cross-Examination of Defendant**

12 A defendant who testifies at trial waives his right against
13 self-incrimination and subjects himself to cross-examination
14 concerning all matters reasonably related to the subject matter of
15 his testimony. See, e.g., Ohler v. United States, 529 U.S. 753, 759
16 (2000) (citing McGautha v. California, 402 U.S. 183, 215 (1971),
17 vacated in part on other grounds, 408 U.S. 941 (1972) ("It has long
18 been held that a defendant who takes the stand in his own behalf
19 cannot then claim the privilege against cross-examination on matters
20 reasonably related to the subject matter of his direct
21 examination")). A defendant has no right to avoid cross-examination
22 on matters which call into question his claim of innocence. United
23 States v. Miranda-Uriarte, 649 F.2d 1345, 1353-54 (9th Cir. 1981).
24 The scope of a defendant's waiver is co-extensive with the scope of
25 relevant cross-examination. United States v. Cuozzo, 962 F.2d 945,
26 948 (9th Cir. 1992); United States v. Black, 767 F.2d 1334, 1341 (9th
27 Cir. 1985) ("What the defendant actually discusses on direct does not
28 determine the extent of permissible cross-examination or his waiver.

1 Rather, the inquiry is whether 'the government's questions are
2 reasonably related' to the subjects covered by the defendant's
3 testimony.").

4 **E. Reciprocal Discovery**

5 Despite the government's requests, defendant has not produced
6 any reciprocal discovery to the government other than the video
7 recordings obtained from the Starbucks parking lot, nor has defense
8 provided any expert notice. Accordingly, to the extent that there
9 exists reciprocal discovery to which the government is entitled under
10 Federal Rules of Criminal Procedure 12.1, 12.2, 16(b), or 26.2 that
11 defendant has not produced, the government reserves the right to seek
12 to have such materials excluded at trial. See United States v.
13 Young, 248 F.3d 260, 269-70 (4th Cir. 2001) (upholding exclusion
14 under Rule 16 of audiotape evidence defendant did not produce in
15 pretrial discovery where defendant sought to introduce audiotape on
16 cross-examination of government witness not for impeachment purposes,
17 but as substantive "evidence in chief" that someone else committed
18 the crime).

19 **F. Affirmative Defense**

20 As discussed above, defendant is not entitled to an affirmative
21 defense based on a claim that he believed the extorted
22 property/proceeds lawfully belonged to him. Defendant's threats to
23 disclose embarrassing, sensitive information of a sexual nature about
24 the Victim D.B. on defendant's Twitter account the Victim were
25 inherently wrongful, regardless of whether defendant actually or
26 reasonably believed that he was entitled to the money. In this
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1 context, a claim of right defendant is not proper. See United States
2 v. Villalobos, 748 F.3d 953 (9th Cir. 2014).

3 Dated: May 7, 2015

Respectfully submitted,

4 STEPHANIE YONEKURA
Acting United States Attorney

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6 Assistant United States Attorney
7 Chief, Criminal Division

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